IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING
A JUDGE NO. 02-487

Supreme Court Case
No.: SC03-1171

RESPONDENT'S MOTION TO DISMISS THE PENDING CHARGES OR IN LIMINE TO EXCLUDE THE PURPORTED HOLDER PAPER AND HOARD PAPER BASED ON EVIDENTIARY IMPROPRIETIES AND INCORPORATED MEMORANDUM OF LAW

The Honorable Gregory P. Holder ("Judge Holder" or "Respondent"), by counsel, files with the Hearing Panel of the Florida Judicial Qualifications Commission (the "Panel") this Motion to Dismiss the Pending Charges or in Limine to Exclude the Purported Holder Paper and Hoard Paper Based on Evidentiary Improprieties and Incorporated Memorandum of Law. The grounds upon which this Motion is based are set forth below.

I. INTRODUCTION

On July 16, 2003, the Florida Judicial Qualifications Commission (the "JQC") filed a Notice of Formal Charges (the "Notice") to determine whether Respondent plagiarized an Air War College ("AWC") paper submitted in 1998. To support the JQC's allegations of plagiarism, the JQC Special Counsel intends to offer into evidence copies of the Hoard Paper and the purported Holder paper (collectively the "Papers"), which were provided to the JQC by the United States

Department of Justice,[1] the Complainant in this proceeding ("DOJ" or the "Complainant"). [Appendix 1 at A-B] However, recent deposition testimony establishes that the DOJ allowed its official file containing the Papers to be tampered with, and as a result has destroyed or lost evidence critical to Judge Holder's defense.

To make matters worse, the Complainant has severely restricted the scope of the testimony of its employees, effectively precluding Judge Holder from inquiring about the destroyed or lost evidence. The inexplicably missing evidence, as well as the DOJ's intentional withholding of information, violates Judge Holder's federal and state due process rights requiring dismissal of the charges against Respondent, or, at a minimum, the exclusion of the Papers from evidence.

II. FACTUAL BACKGROUND

During a weekend in January of 2002, Jeffrey Del Fuoco, a Lieutenant Colonel in the U.S. Army Reserve and an Assistant United States Attorney ("AUSA") for the Middle District of Florida, purportedly found the Papers, along with a typewritten note, in a manila envelope that had been anonymously placed under his office door at the U.S. Army Reserve Headquarters in St. Petersburg, Florida. [Appendix 2 at A-B]

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[1] *See* JQC's Prehearing Statement dated August 25, 2004.

When Del Fuoco initially reviewed the Papers, he noticed "similarities" and put the documents in his briefcase. [Appendix 3 at A] The following Monday, he took the documents to the United States Attorney's Office in Tampa and opened an "official file." *Id.* According to Del Fuoco, he placed the envelope, which contained the typewritten note and both Papers, in the official file. *Id.* At or near that time, Del Fuocco had a conversation with another AUSA, Jeff Downing, regarding the documents and showed Downing the Papers:

> Mr. Del Fuoco told me that he had received two papers that were slipped under his door at the Army Reserve Center. I went to his office. He had the official file in his possession. My recollection is that he opened it on his desk, pulled out two documents, showed them to me; and that's how I learned about it.

[Appendix 4 at A] Downing did not see any of the documents again until the official file was assigned to him on October 21, 2002. *Id.* At that time, Downing realized that the file had been tampered with. Most noticeably, the note and envelope were missing from the official file. *Id.* It is without dispute that the envelope and note disappeared while in the custody of the United States Attorney's Office—a restricted access office with high security—and that neither Del Fuoco nor Downing can offer any explanation about what happened to this crucial evidence. [Appendix 4 at A-B] The DOJ, after conducting its investigation, did not initiate prosecution against Judge Holder. Instead, after the loss or destruction

of this crucial evidence, the Complainant referred the matter to the JQC, and has since provided substantial assistance to the JQC in its prosecution of Judge Holder.

III. ARGUMENT

The charges against Judge Holder must be dismissed for two reasons. First, this proceeding violates federal and state due process requirements because critical evidence—the note and the envelope containing the Papers—appears to have been intentionally destroyed. Accordingly, the charges against Respondent should be dismissed, or, at a minimum, the Papers should be excluded from evidence. Second, Florida law prohibits the admission of evidence when there is a probability it has been tampered with. Given that half of the physical evidence in this case has "disappeared" from a high security site without explanation, there is a strong probability of evidence tampering. As a result, the Papers must be excluded from evidence and, therefore, the charges must be dismissed.

A. Admission of the Papers Violates Federal and State Due Process Rights Because of the Destruction of the Note and Envelope.

A JQC hearing must satisfy procedural and substantive due process requirements. *See, e.g., In re Inquiry Concerning a Judge*, J.Q.C. No. 77-16, 357 So.2d 172, 181 (Fla. 1978). An unbroken line of authority, beginning with the hallmark *Brady v. Maryland*, 373 U.S. 83 (1963), supports the proposition that the "suppression of evidence by the prosecution that is favorable to the accused

violates due process where the evidence is material either to guilt or punishment, regardless of the good faith or bad faith of the prosecution." *State v. Thomas,* 826 So. 2d 1048, 1049 (Fla. 2d DCA 2002); *see also State v. Felder*, 873 So. 2d 1282, 1283 (Fla. 4th DCA 2004). Due process is also violated when evidence that is potentially useful to the defense is lost or destroyed by the police or prosecution in bad faith.[2] *See State v. Guzman*, 868 So. 2d 498, 509 (Fla. 2003) (citing *Arizona v.*

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[2] Throughout this proceeding, the Complainant has acted as a co-prosecutor, along with the JQC, by providing substantial assistance to the JQC's prosecution of Judge Holder. Far beyond mere cooperation, the DOJ has taken active efforts to seek Judge Holder's removal from the bench. It is well established that the actions of a non-state entity trigger constitutional protections when that party acts as an agent of the government. *See Garner v. State*, 729 So.2d 990, 992 n.3 (Fla. 5th DCA 1999). In this context, an agency relationship will be found if the government knows and acquiesces in the activity and the non-state entity is motivated on the basis of assisting the government. *See id.* Here, the JQC was aware of and benefited from the DOJ's efforts, and the Complainant sought to assist the JQC.

In this matter, the Complainant continuously assisted the JQC, a constitutionally created prosecutorial body. The DOJ made the initial referral to the JQC and furnished it with copies of the Papers. Additionally, when Del Fuoco discovered additional potentially relevant documents in his storage facility ("storage facility documents") in late 2003, he stated that he "took them directly to AUSA Jeffrey S. Downing who is the Complainant" in the proceeding. [Appendix 1 at C] At that time, the Complainant expressly offered to provide "additional information regarding the allegations made to or investigated by this office." [Appendix 1 at A] In fact, the record is replete with other instances of the DOJ's pervasive cooperation and assistance, including the continual exchange of information, providing and maintaining documents, and involvement in strategy and analysis:

a. When Del Fuoco purportedly discovered additional documents at his storage facility on October 5, 2003, he Bate [sic] stamped them and

Youngblood, 488 U.S. 51, 58 (1988)); *King v. State*, 808 So. 2d 1237, 1242 (Fla. 2002); *see also California v. Trombetta*, 467 U.S. 479, 488 (1984). Here, the note and the envelope that accompanied the Papers constitute critical evidence that has been destroyed. As a result, the Papers cannot be admitted into evidence without violating Respondent's federal and state due process rights. Consequently, this proceeding must be dismissed.

Due process is implicated when the evidence at issue is "potentially useful to the defense." *Thomas*, 873 So. 2d at 1049; *see also Illinois v. Fisher*, 540 U.S. 544, 548 (2004). This standard of constitutional materiality is met when the evidence "might be expected to play a significant role in the suspect's defense" and "be of such a nature that the defendant would be unable to obtain comparable

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delivered them to Downing, who then provided them to the JQC. [Appendix 5 at A] Del Fuoco also told Mr. Pillans that in 1999 he sent documents relating to the AWC course to a friend in Pittsburgh; [Appendix 5 at B]

b. During Del Fuoco's deposition, AUSA Ralph Lee deferred to Pillans as to whether a document, which Del Fuoco had submitted to Pillans, was within the scope of documents and testimony delineated by United States Attorney Paul I. Perez; [Appendix 6 at A]

c. Pillans and AUSA Downing jointly 1) considered strategy relating to the authentication of the purported Holder paper; and 2) discussed the Air Force investigation; [Appendix 7 at A] and,

d. In correspondence, Pillans reminded Downing of the need for confidentiality. *Id.*

evidence by other reasonably available means." *Trombetta*, 467 U.S. at 488-89. *See also State v. Powers*, 555 So. 2d 888 (Fla. 2d DCA 1990).

The note and the envelope decidedly meet this standard for constitutional materiality. The note, envelope, and Papers are the only physical evidence implicating Judge Holder in this case. In particular, the note and the envelope would have allowed Judge Holder to test the authenticity of the Papers, possibly trace the identity of the sender, or potentially glean other circumstances surrounding the delivery of the documents to Del Fuoco. Indeed, if the note and envelope existed, Respondent could have forensically tested and analyzed that evidence, including

1) Determining the manufacturer and model of the typewriter and potentially the specific typewriter, on which the note was written;
2) Conducting fingerprint and DNA analysis on the note and envelope; and,
3) Performing electrostatic document analysis to detect on the note and/or envelope indented handwriting impressions to determine the source of the Papers.

The importance of this testing is exemplified by the fact that the Papers surfaced under highly suspicious and unexplained circumstances. Among other things, the purported Holder paper has unexplained origins and purports to have been prepared by a Judge who was a cooperating witness in investigations into public corruption. Indeed, multiple eyewitnesses have unequivocally denied the

authenticity of the purported Holder paper. Accordingly, testing and analyzing the note and envelope may have determined who falsely accused Judge Holder, or, at the very least, who was responsible for slipping these documents under Del Fuoco's door.

Not only are the note and envelope material under a constitutional due process analysis, but Judge Holder is unable to obtain comparable evidence by other reasonably available means. *See Trombetta*, 467 U.S. at 489. Judge Holder has no available means to obtain evidence comparable to the note and envelope. Without the original note and envelope, no forensic testing can be performed. Moreover, egregiously, the Complainant refuses to allow its employees to testify as to whether forensic testing was performed before the note and envelope were destroyed, and, if so, the results.[3] Finally, because no copies of the note and envelope exist, Judge Holder is unable to analyze the content of the note. To make matters worse, the only individual who has allegedly seen the note cannot even

[3] As authority for severely restricting the testimony of Del Fuoco and Downing, the Complainant relies on a federal regulation which provides that a DOJ employee may only testify to those "facts" or areas of inquiry which are pre-approved by the responsible U.S. Attorney. *See* 28 C.F.R. §§ 16.21, *et. seq*.

testify accurately about its contents.[4] In sum, the note and the envelope were key to Respondent's defense challenging the authenticity of the Papers, and in their absence, Judge Holder has no reasonable alternative sources of evidence.

Under Florida law, if the "destruction of the evidence is a flagrant and deliberate act done in bad faith with the intention of prejudicing the defense, that alone is sufficient to warrant dismissal of the charges." *Powers*, 555 So. 2d at 888. Bad faith exists when the conduct of the person who destroyed the evidence demonstrates that he knew that the evidence could form a basis for exonerating the defendant. *See e.g. King*, 808 So. 2d at 1242; *Youngblood*, 488 U.S. at 58.

Here, the Complainant was clearly aware of the importance of the note, envelope, and Papers. This evidence was compelling enough to the DOJ that it prompted them to utilize their time and resources to initiate a federal investigation to determine whether to initiate a federal prosecution. The note and envelope vanished in the midst of this investigation—which had largely been conducted by Del Fuoco, the very person who allegedly discovered the documents.

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[4] According to Del Fuoco's Affidavit, the note purportedly said: "Col. Del Fuoco" or "Mr. Del Fuoco," "I thought you would be interested in this" or "something should be done about this" or words to that effect. It was signed "A concerned citizen" or "a concerned taxpayer" or in some other manner. [Appendix 8 at A (emphasis added)] Subsequently, during his deposition, Del Fuoco's recollection was less precise—and arguably contrary to his Affidavit. At one point, he testified that "I don't remember how it was, you know, left in terms of the signature." [Appendix 8 at B] Del Fuoco then later testified that there was no signature. *Id.*

The Complainant admits to securing the note and envelope in an official file at the United States Attorney's Office—a high security office. It is undeniable that the United States Attorney's Office severely restricts access to its official files, most of which contain highly confidential information regarding criminal matters. Therefore, the inexplicably missing note and envelope could only have vanished as a result of actions by a very limited number of persons that both had access to the file and knew of the importance of the physical evidence. Given the limited access to the office and official file, the disappearance of the note and envelope simply could not have been accidental.[5] Accordingly, dismissal is warranted on this basis alone.

Indeed, the material adverse effects of the destruction of the note and envelope have been compounded by the fact that Respondent has been precluded from questioning DOJ officials about the disappearance of that evidence. When

[5] Even in the absence of bad faith, the loss or destruction of evidence can be so critical to the defense of a case that a trial is rendered fundamentally unfair warranting dismissal on due process grounds. *See Powers*, 555 So. 2d at 888. In *Powers*, defendants alleged that the police violated their due process rights by not videotaping their sobriety tests. The court held that if a videotape had been made and was subsequently misplaced or destroyed, the defendants' due process rights would have been violated irrespective of the good faith or bad faith of the police. *See id.* at 889. Here, the missing note and the envelope are critical to Judge Holder's defense. Accordingly, further pursuit of the charges in this matter violates Judge Holder's due process rights and dismissal is warranted.

Respondent issued a subpoena to Del Fuoco in August 2004, the Complainant responded by stating:

> I informed you the U.S. Attorney's scope determination addresses [*i.e.*, prohibits Respondent's counsel from inquiring about] any information related to, based upon or contained in the files of the U.S. Attorney, as well any information known by Mr. Del Fuoco because of his performance of official duties as an Assistant U.S. Attorney or because of his official status as an Assistant U.S. Attorney.

[Appendix 9 at E] Based on these unreasonable restrictions, the only witnesses with knowledge have outright refused to testify regarding matters that clearly could have exculpatory value. The DOJ has even refused to allow testimony as to whether any forensic analysis was performed on the note and envelope before they were lost.[6] In addition, the Complainant has intentionally refused to allow Respondent to discover information about the DOJ's experience in receiving evidence, maintaining chains of custody, and loss of evidence. [Appendix 9 at A,

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[6] The following is from Del Fuoco's deposition:

> Q. Did you or anyone else to the best of your knowledge do a fingerprint analysis on the note?
>
> A. I've been advised it's outside of the scope [of testimony permitted by DOJ].
>
> Q. Okay. To the best of your knowledge – Well, did you or anyone else to the best of your knowledge run any DNA or any other analysis whatsoever on the note.
>
> A. After consultation I believe the answer would be outside the scope of the authorization.

[Appendix 9 at B]

and C-D] Moreover, the Complainant has refused to allow Respondent's counsel to inquire about other documents or matters contained within, or relating to, the official file of the U.S. Attorney's Office regarding this matter:

> MR. WEINSTEIN: So the record is clear, with respect to what you have denominated as the USAO jacket, okay, you will not permit me to inquire regarding the documents that are in the jacket, correct?
>
> MR. LEE: Absolutely not. They're beyond the scope of Mr. Perez's authorization.
>
> MR. WEINSTEIN: I understand. I just want to make sure we've got a clean record. Okay. And you're not going to let me ask any questions regarding any matters contained within that file?
>
> MR. LEE: You mean for you to review it and then ask questions? Absolutely not. It's beyond the scope of Mr. Perez's authorization.
>
> MR. WEINSTEIN: Okay. And there is, in fact, sir so that the record is clear, additional documents that relate to this matter that you have not brought today; right, sir?
>
> MR. LEE: Absolutely because they're beyond the scope of Mr. Perez's authorization in this matter.

Id. Even though half of the relevant evidence has been lost while in the DOJ's custody, the Complainant under claim of privilege has steadfastly refused to disclose relevant information regarding the file at issue. *Id.* Such a refusal has only compounded the due process violation relating to the missing evidence. [7]

When the government is unable to produce physical evidence which has been in its possession, a "serious constitutional issue is presented." *Adams v. State*,

[7] The assertion by Complainant—the JQC's collaborator and alter ego—of a privilege against disclosing essential, material evidence justifies dismissal of the charges. See § 90.510 Fla. Stat. ("Privileged Communication Necessary to Adverse Party")

367 So. 2d 635, 639 (Fla. 2d DCA 1979). "Depending on the individual facts of the case, the failure to preserve evidence already gathered may constitute a due process violation requiring dismissal of the complaint." *State v. Daniels*, 699 So. 2d 837, 838 (Fla. 4th DCA 1997). Because the due process violation involves the suspicious delivery and the apparent destruction of evidence critical to the defense, the sanction of dismissal is warranted. At the very least, the Panel should exclude the Papers from the evidence.[8]

B. The Papers Should Be Excluded From Evidence Because The Evidence Has Been Tampered With.

Relevant physical evidence is inadmissible where there is a probability that the evidence has been tampered with. *See Murray v. State*, 838 So. 2d 1073, 1082

[8] Beyond due process, the Papers should be excluded under the applicable rules of civil procedure. "Cases in which evidence has been destroyed, either inadvertently or intentionally, are discovery violations involving the application of Florida Rule of Civil Procedure 1.380, under which sanctions are reviewed for abuse of discretion." *Nationwide Lift Trucks, Inc. v. Smith*, 832 So.2d 824, 826 (Fla. 4th DCA 2002). Generally, the appropriateness of sanctions for failing to preserve evidence "depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." *Id.* A showing of intentional misconduct, however, is not a precondition of dismissal where one has "destroyed relevant and material information … and that information is so essential to the appellee's defense that it cannot proceed without it." *Id.* (quoting *DePuy, Inc. v. Eckes*, 427 So.2d 306 (Fla. 3d DCA 1983)). Here, because the note and the envelope are critical to Judge Holder's challenge to the authenticity of the Papers, the JQC's charges should be dismissed. At a minimum, exclusion of the Papers is warranted.

(Fla. 2002); *Peek v. State*, 395 So. 2d 492, 495 (Fla. 1980). The burden is on the party attempting to exclude the evidence to show the probability of tampering. *See Murray*, 838 So. 2d at 1082. Once sufficient evidence of tampering is produced, the proponent of the evidence must explain the discrepancy or submit evidence that tampering did not occur. *See id*.; *Taplis v. State*, 703 So.2d 453, 454 (Fla. 1997) (per curiam).

1. <u>The deposition testimony of Del Fuoco and Downing establishes that the "Official File" at the United States Attorney's Office was tampered with.</u>

The Florida Supreme Court has unequivocally held that there is a probability of evidence tampering where, like here, half of the evidence is lost. *See Murray*, 838 So. 2d at 1083. In *Murray*, the defendant was indicted for, among other things, first degree murder and sexual battery. *Id.* at 1075. As part of the investigation, hair evidence, which included a nightgown and lotion bottle, were placed in a sealed bag by the investigating officer and given to the Florida Department of Law Enforcement ("FDLE") for processing and analysis. *See id*. at 1083. When an FDLE analyst unsealed the bag, the lotion bottle was missing. *See id*. Test results subsequently performed on the hairs recovered from the nightgown matched the defendant's DNA profile. *See id*.

At trial, notwithstanding defendant's objection that the missing bottle demonstrated a probability of evidence tampering, the trial court allowed the

prosecution to introduce the nightgown evidence. *See id.* The Florida Supreme Court reversed, finding that the "obvious discrepancy" in the testimony of the investigating officer and the FDLE analyst established the probability of tampering. *See id.* According to the Court:

> [The investigating officer] clearly remembered placing both the bottle of lotion and nightgown in the same bag and specifically did so in order to keep them together. The analyst who received the sealed bag, however, stated unequivocally that although the bag had not been previously opened, it no longer contained the lotion and further she never received the lotion.

Id.

Similarly, in this proceeding, Del Fuoco clearly remembers placing the note, envelope, Hoard paper, and purported Holder paper in the "official file." [Appendix 3 at A] According to Del Fuoco, both the Papers and the note "all stayed in the envelope" and "the envelope went into the [official] file" at the United States Attorney's Office. [Appendix 10 at A] Subsequently, when the official file was transferred to Downing, it no longer contained the envelope or note:

> Q. Have you ever questioned Mr. Del Fuoco about the whereabouts of the envelope?
>
> A. I believe at one point I asked him if he knew where the envelope was and the note.
>
> Q. Okay. What was his response?
>
> A. I believe his response was that it would have been in the file.

Q. And did you thereafter check the file to determine whether or not the envelope and note were, in fact, present?

A. I did.

Q. And what did you find, sir?

A. I did not find a note and an envelope.

[Appendix 4 at A] Accordingly, just as in *Murray*, the testimony in this case establishes that half of the evidence placed into a government container has mysteriously disappeared. Thus, Judge Holder has not only met his burden of showing the "probability" of evidence tampering, he has clearly established that the crucial evidence in this case has, in fact, been tampered with.

2. <u>The JQC cannot meet its burden of establishing that evidence tampering did not occur.</u>

Based on the "probability" of evidence tampering, the Papers are inadmissible unless the JQC explains the discrepancy or submits evidence demonstrating that tampering did not occur. *See Cridland v. State*, 693 So. 2d 720, 721 (Fla. 3d DCA 1997) (per curiam) (evidence inadmissible where prosecution failed to establish a proper chain of custody). Importantly, the failure to produce a witness to explain an "obvious discrepancy" will result in the exclusion of the evidence. Thus, in *Murray*, the Court held the challenged evidence inadmissible stating:

> Despite the fact the sealed bag had no indications that it had been previously opened, it did not contain the bottle of lotion. *This discrepancy was never explained.*

Murray, 838 So. 2d at 1083 (emphasis added).

Similarly, in this case the "obvious discrepancy" cannot be explained. On the contrary, it is apparent that someone (a) gained access to the file; (b) handled and otherwise tampered with the official file; (c) opened the envelope; (d) removed the note and two papers; and (e) took both the note and the envelope. In fact, Downing is not aware of a single witness who can offer any explanation whatsoever for the disappearance of this significant evidence:

> Q. Do you have any knowledge, sir, to the extent that such a note ever existed what became of it?
>
> A. No, I do not.
>
> Q. Okay. Are you aware of any other witness who has any knowledge of what became of such a note if, in fact, one ever existed?
>
> A. No.
>
> Q. With respect to the manila envelope that you've described previously, Mr. Downing, do you have any knowledge about the existence or the current whereabouts, I should say, of that envelope?
>
> A. No, I don't.

[Appendix 11 at A]

In fact, Downing cannot even identify the Papers currently in the official file as the same papers that Del Fuoco showed him in January of 2002, shortly after Del Fuoco claims to have anonymously received them:

> Q. Okay. When Mr. Del Fuoco first showed you these documents in early 2002, did you read them word for word?

A. No. I did not.

Q. Okay. And so you could not sit here today under oath and tell me that when you looked at these documents on or about October 21, 2002, that you could positively identify them as the documents that Mr. Del Fuoco showed you, correct?

A. I couldn't do that.

Id. Therefore, not only are the note and envelope missing, but the chain of custody has been broken. Downing cannot establish the authenticity of the Papers contained in the official file which were indisputably tampered with. Therefore, because the JQC cannot meet its burden of demonstrating that evidence tampering did not occur, the Papers are inadmissible in this proceeding.

IV. CONCLUSION

For the foregoing reasons, the charges against Respondent must be dismissed or, at a minimum, the Papers must be excluded from evidence.

Dated: March 18, 2005

(Attorney Signature Appears on Following Page.)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on March 18, 2005, a copy of the foregoing has been served by Federal Express to Ms. Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; Honorable John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302; Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629; and by Facsimile (without Appendix) and Federal Express to Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell Ditmar DeVault Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202.

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